Supreme Court, U. S.
FILED
JUL 16 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1446

HENRY LEE ROGERS, LEE CHESTER SMITH, and N. A. THOMPSON,
Petitioners,

v.

INTERNATIONAL PAPER COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, AND ITS LOCAL 2033; UNITED PAPERWORKERS INTERNATIONAL UNION AFL-CIO, AND ITS LOCALS 731, 735, 833 and 898,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT INTERNATIONAL PAPER COMPANY IN OPPOSITION

PAUL B. YOUNG
P.O. Box 7808
Pine Bluff, Arkansas 71601

R. F. ADAMS
BROCK B. GORDON
P.O. Box 1988
Mobile, Alabama 36601

BRIDGES, YOUNG, MATTHEWS & DAVIS
JOHNSTONE, ADAMS, MAY, HOWARD & HILL
STEPTOE & JOHNSON
Of Counsel

THOMPSON POWERS
JAMES L. MCHUGH, JR.
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Respondent International Paper Company

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1446

HENRY LEE ROGERS, LEE CHESTER SMITH,
and N. A. THOMPSON,
Petitioners,

v.

INTERNATIONAL PAPER COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, AND ITS LOCAL 2033; UNITED PAPERWORKERS INTERNATIONAL UNION AFL-CIO, AND ITS LOCALS 731, 735, 833 and 898,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF RESPONDENT INTERNATIONAL PAPER COMPANY IN OPPOSITION

STATEMENT OF THE CASE

Petitioners commenced this action in 1970 as a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.;* 42 U.S.C. § 1981; and 29 U.S.C. § 151 *et seq.* The complaint charged racial discrimination by respondents International Paper Company, Pine Bluff, Arkansas (the company) and the

unions representing employees at the company's paper mill at Pine Bluff, Arkansas.

In 1968, the Office of Federal Contract Compliance (OFCC) sought to provide additional opportunities for advancement of black employees in the Southern Kraft Division of International Paper company, which includes the Pine Bluff mill, in light of the initial district court opinion in *U.S.* v. *Local 189,* 282 F. Supp. 39 (E.D. La. 1968). Under the direction and with the written approval of the OFCC, the company and the unions representing Southern Kraft employees entered into a memorandum of understanding (the Jackson Memorandum) which modified their labor agreement. The Jackson Memorandum, which became effective approximately 18 months *before* the filing of the charges on which this action is based, inter alia, designated an affected class of black employees and afforded them the opportunity to make interdepartmental transfers and to compete with non-affected class employees for job vacancies on the basis of mill seniority.

The Jackson Memorandum was later revised in July, 1972, again under the direction and with the written approval of the OFCC, to deal with certain refinements such as job skipping, residency periods, eligibility for promotion based on temporary assignments and eligibility for promotion and transfer in recall situations. Since 1968 all plant promotions and other employment practices have been conducted in accordance with the Jackson Memorandum and these revisions.

The District Court Opinion. The district court found that the Jackson Memorandum of 1968 spelled the cessation of any overt racial discrimination at the Pine Bluff mill and that as of that time members of the affected class were given the opportunity to seek

their rightful place by competing for vacancies on the basis of qualifications and mill seniority. The court also determined that after 1968 no qualified senior affected class employee failed to receive a job he sought. In addition, the district court found that: (1) the company minority hiring record over the past four years was "impressive and salutary;" (2) the hiring policies of the company are not discriminatory; and (3) the testing program was not shown to have a racially disparate impact and was highly correlated with successful job performance.

Accordingly, the district court declined to grant injunctive relief in favor of petitioners but retained jurisdiction and ordered the company to make periodic reports of its hiring activities. The district court also refused to award back pay, but granted petitioners' requests for costs and attorneys fees because it felt that the lawsuit had acted as a catalyst in some respect.

The Court of Appeals Opinion. On appeal the Eighth Circuit reversed in part, vacated in part and remanded the case for development of additional facts. The only relief ordered by the court of appeals was that the age eligibility for the apprenticeship program be enlarged for affected class employees and that the practice regarding red circling of wages be revised to conform to guidelines set by the court.

The court of appeals also directed that the district court conduct further proceedings to determine (1) whether there is racial discrimination in the hiring of supervisors; (2) whether the administration of tests for maintenance craft jobs results in racial discrimination in hiring or transfers; (3) whether, and the extent

to which, job residency requirements are necessary and whether functionally equivalent experience in other jobs may satisfy these requirements; (4) whether service on certain jobs in lines of progression is necessary for advancement therein; and (5) whether the company's policy of advancing affected class members is as expeditious as its policy for advancement of employees returning from military service.

In light of the terms of its remand, the court of appeals did not order any back pay award.

ARGUMENT

I. In Its Present Posture This Case Fails To Raise an Important Question of Federal Law

The petition requests that the judgment of the court of appeals "insofar as it fails to grant back pay" be summarily vacated and remanded for further consideration in light of the Court's then anticipated decision in *Albemarle Paper Company* v. *Moody*, — U.S. —, 43 U.S.L.W. 4880 (June 25, 1975). However, such requested action by the Court would not be appropriate.

Further proceedings in the district court have been ordered by the court of appeals which remanded the case for hearings and findings on a number of issues. On remand, there is no reason to doubt that the district court will follow the instructions of the court of appeals as well as apply the extant standards of the Court, including, to the extent applicable, those enunciated in *Albemarle*.

Since the judgment of the court of appeals has not finally determined this case and because further proceedings have been ordered, vacation of the judgment

below is not required and would be an improvident exercise of the Court's certiorari jurisdiction. Summary vacation and remand would be appropriate only if the court of appeals' judgment were final and, if not vacated by this Court, would prevent the district court from considering the impact of *Albemarle*. But such is not the situation here since the district court will have an opportunity to consider the *Albemarle* decision as well as the matters designated by the court of appeals.

At this stage of the proceedings there is no important federal question raised[1] and the granting of a writ of certiorari would only interrupt unnecessarily the normal judicial process. Petitioners erroneously argue that efficient judicial administration would be

[1] Petitioners' claim conflicts with decisions of the Third, Fourth, Fifth, Sixth and Seventh Circuits. This claim is based upon the incorrect assumption that the Eighth Circuit held that comprehensive injunctive relief would obviate the necessity of back pay. However, in this case no comprehensive injunctive relief has been granted. Rather, with the exception of two relatively minor directions as to age levels for apprenticeship entry and red circling of wages, the court of appeals simply remanded for further consideration of the facts.

In the cases which petitioners argue are in conflict, comprehensive injunctive relief and back pay awards were made only after findings of discriminatory employment practices in violation of Title VII and a showing of economic loss by class members. Those cases are inapposite to the case here where no proof of economic loss was adduced, where injunctive relief was specifically found to be unwarranted by the trial court and where the appellate court has not directed the issuance of a comprehensive injunction but instead called for further hearings on the justification for certain aspects of the company's promotion and hiring practices. Furthermore, the remand proceedings may prove that some of the changes sought by the plaintiffs would give no promise of greater affected class movement than has already occurred or could be expected under previous remedial efforts.

served by the granting of a writ in this case. Clearly the opposite would result if this case were remanded to the court of appeals since this would only delay the further hearing by the district court which is necessary to determine the facts upon which back pay relief, if any, could be based.

II. This Case Raises Issues Not Controlled by or Considered in Albemarle Paper Company v. Moody

Albemarle Paper Company v. *Moody* held, *inter alia,* that "back pay should be denied only for reasons which if applied generally, would not frustrate the central statutory purpose of eradicating discrimination through the economy and making persons whole for injuries suffered through past discrimination." *Supra* at 4885. Specifically, the Court determined that the absence of bad faith on the part of the employer was not a ground for withholding an award of back pay.

However, the Court recognized that facts and circumstances peculiar to particular cases may present reasons for denying back pay. *Supra* at 4885-6. For example, it noted that back pay is not available as relief if the employer's conduct was undertaken in good faith reliance upon an interpretation or opinion of the Equal Employment Opportunity Commission. *Supra* note 17 at 4885-6. Further, the Court explicitly did not repudiate those cases in which back pay was denied where the employer had discriminated on sexual grounds in reliance upon state female protective statutes which were inconsistent with Title VII. *Supra* note 18 at 4886.

Similarly, the court of appeals did not decide the issues presented by this case where substantial and

effective remedial measures were collectively bargained and adopted long before definitive court rulings concerning Title VII were issued; where unilateral changes in such new practices were authoritatively determined to be not required by a federal anti-discrimination law, and; where refinements in these practices were collectively bargained in response to evolving fair employment standards and experience in the movement of the affected class.[2] While these actions left the employer's seniority practices subject to judicial review and further prospective revision, they provide an equitable basis under the *Albemarle* rationale for denying back pay consistent with Congressional intent even if the district court determines on remand that subsequent revision is required.

Because this case is distinguishable from *Albemarle Paper Company* in several important respects and has already been remanded to the district court there is no basis for the Court to grant the relief sought by petitioners. If the Court is nonetheless inclined to grant certiorari, it should afford respondents the opportunity to fully develop the distinctions between this case and *Albemarle* through briefs and argument.

---

[2] Both Jackson Memoranda were approved in writing by the Director of OFCC, the Federal official properly authorized to make such rulings under the Executive Order. 41 C.F.R. 60-1.2.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit be denied.

Respectfully submitted,

PAUL B. YOUNG
P.O. Box 7808
Pine Bluff, Arkansas 71601

Of Counsel:

BRIDGES, YOUNG, MATTHEWS
& DAVIS

R. F. ADAMS
BROCK B. GORDON
P.O. Box 1988
Mobile, Alabama 36601

Of Counsel:

JOHNSTONE, ADAMS, MAY,
HOWARD & HILL

THOMPSON POWERS
JAMES L. MCHUGH, JR.
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Respondent
International Paper Company

Of Counsel:

STEPTOE & JOHNSON